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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, *Petitioner,*

v.

NATIONAL FOOTBALL LEAGUE, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

National Football League, Chicago Cardinals Football Club, Inc., New York Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club

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PETITION FOR REHEARING

Respondents, National Football League, Chicago Cardinals Football Club, Inc., New York Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club, petition this Honorable Court for a rehearing and specify the following:

GROUNDS

I

The opinion of this Court constitutes a discrimination against the sport of professional football and a preferential "exemption" of the sport of professional baseball.

The opinion of the Court holds that Congress, by failing to act after the *Federal Baseball* case, excluded baseball from the scope of the Sherman law but included football. The opinion further states that consideration of the basic differences, if any, between baseball and football is not necessary to the decision. In other words, the name of the sport is all-controlling. For purposes of this Petition, we think it only necessary to point out that the only basic difference in the record is that which this Court, as well as the American public, is fully informed upon, to-wit: the shape of the ball.

The American ideal of fair play historically has had its greatest expression on the athletic fields. It is for the Congress to legislate both the exceptions and the coverage of the Sherman law and it is respectfully submitted that this Court should not read into any act of Congress an unreasonable discrimination. We cannot believe that the size or shape of the ball or the historical accidents of previous litigation and congressional inaction justify any difference in the result of similar cases. We respectfully suggest that the opinion of this Court in the case of *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S. Ct. 693, is analogous and indeed controlling. In that case, the Court, speaking through Mr. Chief Justice Warren, stated, at page 694:

"The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

"Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

This Court by judicial legislation has accomplished a result which Congress could not attain because of the due process clause of the Fifth Amendment. As Mr. Chief Justice Taft said in *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, at page 129:

"Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws."

Had Congress committed such a discrimination, it undoubtedly would be held to be unjustifiable. Where as here it has occurred in this Court, it is only by the granting of this petition that the requirements of due process can be met. Certainly this Court would not impute to Congress an unconstitutional intent.

II

The opinion proscribes the principle of stare decisis and by restricting the effect of Federal Baseball to the business of baseball confounds the doctrine of stare decisis and res judicata.

III

Although the opinion proclaims that the rationale of Federal Baseball is to be found in a consideration of the degree of interstate activity involved, the Court refuses to apply the norm which it establishes.

In the opinion the Court concludes: "the volume of interstate business involved in organized football places it within the provisions of the Act". This conclusion can only be predicated upon the allegations of the complaint which relate to interstate business. We invite a comparison of these allegations with those of similar import which this Court considered in *Toolson* v. *New York Yankees*, 346 U.S. 356, a case which was likewise a review of a dismissal of a complaint. We submit that the allegations of the Toolson complaint are much more specific, definite and substantial upon the nature and extent of interstate activity involved. Yet the Court could not conclude that the volume of interstate activity involved in the business of baseball placed it within the orbit of the Act. The *Toolson* and *Radovich* decisions are irreconcilable.

IV

The argument and deliberation of this case was clouded by an extraneous issue which had no bearing upon the discussion.

The reply brief of Petitioner for the first time brought into contention a system of player selection commonly known as the "draft". The Court during

oral argument questioned the propriety of player selection. Considerable criticism in the public press has been directed at this device. However the "draft" is not an element for consideration in this case. There is no allegation in the complaint concerning the draft, nor that Radovich was drafted, nor that he was affected in any manner by the draft. The fact is that Radovich was never drafted.

V

The opinion expresses a desire to preserve the status quo and to place upon Congress the onus of providing remedial legislation if any be required. Yet the decision entered herein is contrary to that avowed intention and upsets rather than preserves existing conditions.

Assuming that the Court is correct in leaving to Congress the duty of undoing the effect of the *Federal Baseball* decision (if in fact any undoing is in order), then the Court should be consistent in standing by that decision and its reasonable import. Until Congress has acted, this Court should apply *Federal Baseball* as far as law and logic demand. Certainly law and logic require that *Federal Baseball* be followed in all identical factual situations. And the complaint before this Court in Radovich informs us that professional football commenced operations in the very year of the *Federal Baseball* decision and adopted the identical pattern employed by professional baseball.

Mr. Justice Harlan in his opinion in the case at bar suggests the course to be followed if logic and the *status quo* are to be considered. There it is stated that if the situation resulting from *Federal Baseball* is to be changed, it is far better for Congress to do so than for this Court to becloud the situation further

either by making untenable distinctions between baseball and other professional sports, or by discriminatory fiat in favor of baseball.

VI

The opinion although pointing out the injustices of retroactivity disregards the fact that the instant decision has a retroactive effect replete with injustices.

In *Toolson* this Honorable Court was careful to point out the serious and severe consequences to baseball which would have resulted from a disturbance of *Federal Baseball*. Yet Football, which has patterned itself upon the *Federal Baseball* decision since 1922 is not afforded like consideration for the consequences that obviously will flow from retroactive application of a new and discriminatory rule to its operations.

CONCLUSION

Wherefore respondents pray that for the reasons hereinabove stated this Honorable Court reconsider the opinion entered herein and grant a rehearing for that purpose.

Respectfully submitted,

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Certificate of Counsel

MARSHALL E. LEAHY does hereby certify that he is the attorney for the respondents in the above-entitled proceeding and that the foregoing petition for rehearing is presented in good faith and not for delay.

MARSHALL E. LEAHY